

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1399 OF 2005

IN
SUIT NO.1308 OF 2005

Marina Francis Thanicatt ... Plaintiff

V/s.

Jennifer Collin Pinto & Ors. ... Defendants

Ms.A.A. Agarwal for Plaintiff

Mr.N.N. Gawankar with Mr.Arfan Sait for Defendant No.1

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **AUGUST 8, 2006**

P.C.:

. The Plaintiff has filed the present Motion for certain reliefs. The Plaintiff claims that she has a 1/8th share in the property of her deceased father Sebastian Francis Fernandes. The Plaintiff and Defendant Nos.1 to 7 are siblings. According to the Plaintiff, her father died intestate on 9.6.1987. Her mother died intestate on 17.3.2000. Her father was residing in a tenanted flat. The building in which he was residing is being redeveloped by Defendant No.8. The father of the plaintiff had filed R.A.D. Suit No.1624 of 1986 before the Small Causes Court. Consent terms were filed in the suit, which was then disposed off. Under the consent terms, the father of the plaintiff was to hand over possession of the tenement in his possession and he was to be given an alternate accommodation on ownership basis in the redeveloped property. The plaintiff contends that Defendant No.1

should not be put in possession of the alternate accommodation as and when it is ready. She contends therefore that Defendant No.8 should be directed to desist from giving the possession of the flat which is to be allotted in lieu of the tenanted premises of her father.

2. It appears that for the first time in reply to the present Motion, Defendant No.1 has contended that the father has left behind a will dated 13.7.1985 in which she has been bequeathed the tenanted premises. Admittedly, there is no probate obtained in respect of the will of the father. Therefore, Defendant No.1 cannot claim any rights on the basis of this will.

3. The learned Advocate for Defendant No.1 contends that although the will has not been probated due to lack of funds, Defendant No.1 is exclusively entitled to alternate accommodation which would be provided by Defendant No.8 in the new construction. He contends that the consent terms indicate that the father of the plaintiff and the defendants desired to put Defendant No.1 in possession of the new premises exclusively and therefore, bequeathed the same to her exclusively. Reliance is placed on clause 26 of the consent terms to point out that the parties had agreed that Defendant No.1 should be admitted as a member of the proposed cooperative society. This indicates that the plaintiff's father who was alive when the consent terms

were signed wanted Defendant No.1 to own and possess the alternate accommodation exclusively, according to the learned Counsel for Defendant No.1.

4. In my view, Defendant No.1 cannot claim any exclusive right to the new accommodation, prima facie. Admittedly, the will of Sebastian is not probated. Therefore, no ownership rights can follow on account of this will. The submission that clause 26 of the consent terms indicates the intention of Sebastian to bestow an alternate accommodation on Defendant No.1 also cannot be accepted. All other terms of the consent terms indicate the plaintiff therein i.e., Sebastian would have a right to the premises on ownership basis, in the structure to be constructed in lieu of his tenanted premises.

5. The plaintiff in any event would thus be entitled to a 1/8th share of the suit property i.e., the new accommodation which would be made available once the construction is completed by Defendant No.8.

6. By an order dated June 9, 2005, the defendants were directed not to create any further rights in respect of the property mentioned at Exhibit A to the plaint. The plaintiff contends that the new building is nearing completion and in all probability Defendant No.8 would put Defendant No.1 in possession of the new premises. The learned Counsel for the Plaintiff submits that if possession of the new flat is given to Defendant

No.1, the plaintiff would have no way of exercising her right. The plaintiff has evaluated the flat on the first floor of Devarti Building i.e., building under construction. The flat admeasures 1100 sq.ft. The plaintiff has valued the same at Rs.48 lacs. According to the plaintiff, she would be thus, entitled to Rs.6 lacs, being the 1/8th share.

7. In my view, the interests of justice would be met if the plaintiff is granted prayer clause (b) in the present Motion. However, it is made clear that in the event Defendant No.1 deposits the amount of Rs.6 lacs in this Court she may apply to this Court for being handed over possession of the new premises.

8. Motion is disposed off accordingly.